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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

– against –

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Can the constitutional requirement that evidence of actual malice in a public figure libel case be "clear and convincing" be disregarded for purposes of a defendant's motion for summary judgment?

2. Does the First Amendment require that a defendant's motion for summary judgment in a public figure libel action be granted when no more than nominal damages could be awarded after trial because the plaintiffs' reputations had previously been so diminished, by their own statments and those of others about them, that the statements they now challenge could not cause further harm?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. The Investigator Publishing Company is a Texas corporation. It does not have any subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
Questions Presented.....	(i)
The Parties.....	(ii)
Opinions Below.....	2
Jurisdiction.....	2
Statutory Provision Involved.....	3
Statement of the Case.....	3
Reasons for Granting the Writ.....	10
Argument.....	13
I THE RULE ESTABLISHED BY THE COURT OF APPEALS BELOW IMPERMISSIBLY WEAKENS THE CONSTITUTIONAL PROTECTION PROVIDED BY THE ACTUAL MALICE REQUIREMENT OF TIMES v. SULLIVAN.....	13
II WHERE, AS HERE, THE REPUTATIONS OF PUBLIC FIGURE LIBEL PLAINTIFFS ARE SO DEBASED THAT THEIR LEGAL INTEREST IN AVOIDING FURTHER INJURY IS MINIMAL BUT THE PUBLIC INTEREST IN ENSURING FREE DEBATE CONCERNING THEIR ACTIVITIES IS COMPELLING, FIRST AMENDMENT CONCERNS REQUIRE	

THAT SUMMARY JUDGMENT BE AWARDED TO DEFENDANTS..... 23

Conclusion..... 31

TABLE OF AUTHORITIES

Page

Cases:

Bieghler v. Kleppe, 633 F.2d 531 (9th Cir. 1980)..... 21

Bose Corp. v. Consumers Union of the United States, Inc., ___ U.S. ___, 104 S. Ct. 1949 (1984)..... 13, 14

Cardillo v. Doubleday & Co., 518 F.2d 638 (2d Cir. 1975)..... 30

Fadell v. Minneapolis Star & Tribune Co., 557 F.2d 107 (7th Cir.), cert. denied, 434 U.S. 966 (1977)..... 11

First National Bank v. Cities Service, 391 U.S. 253 (1968).... 20, 21

Herbert v. Lando, 441 U.S. 153 (1979)..... 19

Hutchinson v. Proxmire, 443 U.S. 111 (1979)..... 15,16

Liberty Lobby, Inc. v. Pearson, 390 F.2d 489 (D.C. Cir. 1968)... 12

Logan v. District of Columbia, 447 F. Supp. 1328 (D.D.C. 1978).. 30

Lorain Journal Co. v. Milkovich, cert. denied, 449 U.S. 966 (1980)..... 18

McBride v. Merrell Dow and Pharmaceuticals, Inc., 717 F.2d 1460 (D.C. Cir. 1983)..... 15

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)..... 10,11, 22

Ray v. Time, Inc., 452 F. Supp. 618 (W.D. Tenn. 1976), aff'd, 582 F.2d 1280 (6th Cir. 1978)... 30

Rebozo v. Washington Post Co., 637 F.2d 375 (5th Cir.), cert. denied, 454 U.S. 964 (1981)..... 11,17

Roberts v. Browning, 610 F.2d 528 (8th Cir. 1979)..... 21

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944).. 21

Schultz v. Newsweek, Inc., 668 F.2d 911 (6th Cir. 1982)..... 21

Simmons Ford, Inc. v. Consumers Union of United States, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981)..... 29

Southmark Properties v. Charles House Corp., 742 F.2d 862 (5th Cir. 1984)..... 21

United States v. General Motors Corp., 518 F.2d 420 (D.C. Cir. 1975)..... 20

Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967)..... 18

Wynberg v. National Enquirer, Inc., 564 F.Supp. 924 (C.D. Cal. 1982)..... 30

Yiamouyiannis v. Consumers Union of the United States, 619 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 839 (1980)..... 11,17

Statutes:

Fed. R. Civ. P. 56(c)..... 3, 20

28 U.S.C. § 1254(1) (1982)..... 3

28 U.S.C. § 1332 (1982)..... 4

No. 85 - _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

-against-

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Jack Anderson, The Investigator Publishing Company and Bill

E. Adkins respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on November 2, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 746 F.2d 1563 (D.C. Cir. 1984). The opinion of the district court is reported at 562 F. Supp. 201 (D.D.C. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1984. Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc with the Court of Appeals. The petition was denied on January 9, 1985. This Court has jurisdiction to review

the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISION INVOLVED

Rule 6(c) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 56(c), provides in pertinent part:

> Motion and Proceedings Thereon. The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

This petition arises from the District of Columbia Circuit's reversal of the District Court's grant of summary

judgment dismissing a libel action brought by Liberty Lobby, Inc., a not-for-profit corporation, and its founder Willis Carto.[1] According to its complaint Liberty Lobby has as its purpose to advocate "patriotism, nationalism, lawfulness, protection of the national interests of the United States and the economic interests of its actions, and strict adherence to the United States Constitution and the form of government it establishes." App. C at 80-a. Liberty Lobby publishes a weekly national newspaper, The Spotlight, with more than 335,000 subscribers, and broadcasts both a daily radio commentary, "This is Liberty Lobby", carried over 460 stations, and a weekly half-hour television show on 30 stations. App. C at 80-a.

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[1] The basis for jurisdiction in federal court was diversity of citizenship (28 U.S.C. § 1332 (1982)).

In this action Liberty Lobby and Carto charged that certain articles which appeared in the October 1981 issue of a magazine called The Investigator contained some thirty statements which defamed them. Their complaint sought $24,000,000 in damages against Jack Anderson, the publisher of The Investigator; The Investigator Publishing Company, and Bill E. Adkins, its President.[2] The articles containing the challenged statements, "The Private World of Willis Carto" and "Yockey, Profile of an American Hitler" were written by Charles Bermant, an employee of defendants, and appeared with an introduction signed by "The Editors"

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[2] Two other individuals, William McGaw and Jay J. Armes, were dismissed as defendants in the District Court and no appeal was taken. The District Court also dismissed without appeal a count of the complaint which claimed that Jack Anderson had illegally converted certain files belonging to Liberty Lobby.

entitled "Did Mein Kampf Spawn Yockey's Imperium, a Book Revived By Carto's Liberty Lobby?" Collectively the three publications recounted the history and views of Liberty Lobby and Carto. As the district court correctly described them:

> Without doubt the plaintiffs are referred to as neo-Nazi, fascist, anti-Semitic and racist. The portrayals form the basis for plaintiff's libel complaint."

App. C at 82-a.

On August 19, 1982 petitioners moved for summary judgment on the grounds that the Liberty Lobby and Carto were public figures who could not meet their burden of proving actual malice, or, alternatively, were libel-proof. Petitioners' motion was supported by an affidavit of Charles Bermant, the author of the challenged articles, which detailed the investigation he made in

writing them and a detailed appendix that compiled the sources upon which Bermant relied. See Affidavit of Charles Bermant filed August 19, 1982 and Appendix thereto, App. D at 107-a, et seq.

On March 31, 1983 the district court granted defendants' summary judgment motion and dismissed the complaint with prejudice. The court considered "[t]he parties' memoranda of law, the several affidavits, and the entire record. . . ." App. C at 78-a. It concluded: "While it is claimed that there are numerous disputed facts in this libel suit, many are of limited, if any, consequence. The material underlying facts necessary for disposition of this motion for summary judgment are uncontested." App. C at 79-a. Because "the plaintiffs are unable to prove actual

malice, the defendants are entitled to summary judgment. . . ." App. C at 104-a. The district court did not reach the alternative "libel-proof" branch of petitioners' motion.

The Court of Appeals, while affirming the district court's grant of summary judgment with respect to twenty-one of the thirty allegedly libelous statements, reversed the summary judgment award as to the nine remaining allegations. App. B at 65-a, 66-a. In assessing the evidence of actual malice with respect to these nine alleged defamations the Court of Appeals expressly declined to apply the "convincing clarity" standard of proof constitutionally required at trial. The court recognized that Liberty Lobby and Carto as public figure libel plaintiffs carried this burden but held that they would be ex-

cused from meeting it at the summary judgment stage of the litigation:

> "With regard to the 'clear and convincing' evidence requirement, the issue can be framed as follows: whether, in order to deny the defendant's motion for summary judgment, the court must conclude that a reasonable jury not only could (on the basis of the facts taken in the light most favorable to the plaintiff) find the existence of actual malice, but could find that it had been established with 'convincing clarity.' We conclude that the answer is no."

App. B at 28-a, 29-a.

Terming the libel proof doctrine a "bad idea", the Court of Appeals also rejected petitioners' argument that summary judgment should be granted because the reputations of Liberty Lobby and Carto had been so irreparably debased by other publications by and about them and because the portions of the articles now claimed to be defamatory

could not, as a matter of law, cause them further harm. App. B at 15-a, 16-a, 17-a, 18-a.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals held inapplicable to motions for summary judgment this Court's requirement, stated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), that actual malice in public-figure libel cases be proved with "convincing clarity". In so holding the Court of Appeals eliminated the "convincing clarity" requirement at the point in the litigation at which its purpose can best be served and, thereby, impermissibly hampered the effectiveness of this constitutional safeguard. The Court of Appeals' ruling stands in conflict with other Circuits which regularly apply the "clear and convincing" evidentiary standard at the summary

judgment stage of public figure libel litigation: Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 942 (2d Cir.), cert. denied, 449 U.S. 839 (1980); Rebozo v. Washington Post Co., 637 F.2d 375, 381 (5th Cir.), cert. denied, 454 U.S. 964 (1981); Fadell v. Minneapolis Star & Tribune Co., 557 F.2d 107, 108 (7th Cir.), cert. denied, 434 U.S. 966 (1977).

2. In public figure libel cases this Court should require that a plaintiff's reputational interest in avoiding adverse comment be weighed against the First Amendment's call for "uninhibited, robust and wide-open" debate. New York Times Co. v. Sullivan, 376 U.S. at 271. The plaintiffs in this case, Liberty Lobby and Carto, are professional polemicists for extreme causes. "[H]owever

reprehensible" their anti-Semitic and racist message, as Justice Burger noted in a 1968 case involving Liberty Lobby, it is "within the areas covered by the First Amendment." Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 n.7 (D.C. Cir. 1968). By the same token the First Amendment must bar Liberty Lobby and Carto from using the libel law as a bludgeon to stave off public comment on their activities. Here, where the reality is that Liberty Lobby and Carto have no reputations to protect, ordinary tort law causation principles that require summary dismissal of their claims are reinforced by compelling First Amendment concerns.

ARGUMENT

I

THE RULE ESTABLISHED BY THE COURT OF APPEALS BELOW IMPERMISSIBLY WEAKENS THE CONSTITUTIONAL PROTECTION PROVIDED BY THE ACTUAL MALICE REQUIREMENT OF TIMES v. SULLIVAN

In Bose Corp. v. Consumers Union of the United States, Inc., _____ U.S. _____, 104 S. Ct. 1949 (1984), this Court reaffirmed its insistence that an appellate court in a public figure libel case has an obligation to "'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" Id. at 1958, quoting, New York Times Co. v. Sullivan, 376 U.S. at 284-86. The Bose Court said:

> "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not

> merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Id. at 1965.

The same First Amendment concerns that compel independent judicial review of a finding of actual malice by clear and convincing evidence at the trial and at the appellate stage of a litigation require application of that evidentiary standard at the summary judgment stage. "Convincing clarity", this Court said in Bose, is a question of constitutional law as well as of fact and it is such on a motion for summary judgment just as much as at any other point in the case. Summary procedures are indeed especially important to the preservation of First

Amendment rights in public figure libel cases because of their role in cutting off unfounded claims before harassment occurs and expression is chilled. As the court said in McBride v. Merrell Dow and Pharmaceuticals, Inc., 717 F.2d 1460, 1467 (D.C. Cir. 1983), quoting Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967):

> "For the stake here, if harassment succeeds, is free debate. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open. . . ."

Id. at 1467.

In Hutchinson v. Proxmire, 443 U.S. 111, 120 (1979) this Court in dicta cast doubt upon the soundness of any

"rule" favoring defendants on summary judgment motions in libel cases, noting that "[W]e are constrained to express some doubt about the so-called 'rule' [because] [t]he proof of 'actual malice' calls a defendant's state of mind into question. . ., and does not readily lend itself to summary disposition." 443 U.S. at 120, n.9. The Court of Appeals erroneously interpreted this caution as license to dilute the constitutionally-required "clear and convincing" burden of proof and thereby favor libel plaintiffs at the summary judgment stage -- a result this Court could scarcely have intended by the Hutchinson footnote.

The aberrant rule fashioned by the Court of Appeals stands in open conflict (see App. B at 32-a) with other courts which have continued routinely to apply the "clear and convincing" standard at

the summary judgment stage just as it is applied at trial or on motion for directed verdict, judgment n.o.v. or on appeal. See, e.g., Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 940 (2d Cir.), cert. denied, 449 U.S. 839 (1980) ("[A] judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, 'a reasonable jury could find malice with convincing clarity'"), quoting, Nader v. de Toledano, 408 A.2d 31, 50 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980) (emphasis by the Nader court); Rebozo v. Washington Post Co., 637 F.2d 375, 381 (5th Cir.), cert. denied, 454 U.S. 964 (1981) ("Since . . . a jury verdict in a defamation case can only be supported when the actual malice is shown by clear and convincing

evidence . . . the evidence and all the inferences which can reasonably be drawn from it must meet that higher standard [on motion for summary judgment]"; Washington Post Co. v. Keogh, 365 F.2d 965, 976 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967) (McGowan, J. concurring) ("The question before us [at the summary judgment stage] essentially is: . . . would Keogh have been entitled to get to the jury on the issue of . . . reckless disregard. . . ."). Accord, Lorain Journal Co. v. Milkovich, cert. denied, 449 U.S. 966, 966 n.1 (1980) (Brennan, J., dissenting).

The requirement that actual malice be proved with convincing clarity is a fundamental element of the Times v. Sullivan holding -- a holding this Court has repeatedly affirmed "as the appropriate First Amendment standard appli-

cable in libel actions brought by public officials and public figures." Herbert v. Lando, 441 U.S. 153, 169 (1979). The Court's decision in New York Times Co. v. Sullivan suggests no rationale for limiting application of the convincing clarity standard to only some stages of a public figure libel case. Yet it is precisely this limited application that the Court of Appeals' decision mandates. In suspending application of the "convincing clarity" standard of proof until after trial has commenced the Court of Appeals' holding guts the protection provided in New York Times Co. v. Sullivan and required by the First Amendment.

Established procedures governing the award of summary judgment also fail to support the bifurcated burden of proof that the Court of Appeals invented

in this case. Under Fed. R. Civ. P. 56(c) a party seeking to defeat a motion for summary judgment must show "sufficient evidence supporting the claimed factual dispute" so as to "require a jury or judge to resolve the parties' differing versions of the truth at trial." First National Bank v. Cities Service, 391 U.S. 253, 288-89 (1968). Implicit in this rule is the requirement that the standard of proof applicable at trial also applies at summary judgment. The Court of Appeals' holding is similarly contrary to the black letter rule of law that if a party moving for summary judgment would have been "entitled . . . to a directed verdict at trial, he is entitled to a summary judgment under Rule 56." United States v. General Motors Corp., 518 F.2d 420, 442 (D.C. Cir. 1975). This rule has been applied

to civil cases of all kinds.3/ It is clear, simple and, prior to the Court of Appeals' decision, unexcepted.

Out of whole cloth -- and thin air -- the Court of Appeals in this case created a special limitation on the constitutionally-required burden of proof in public figure libel cases: that burden of proof, in the District of Columbia Circuit, will henceforth not be applied on motions for summary judgment but only at the conclusion of a trial which, had the proper standard been applied at the summary judgment stage, would never have been held. The Court

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3/ See, e.g., First National Bank v. Cities Service, supra, 391 U.S. at 288-89 (1968); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 624 (1944); Southmark Properties v. Charles House Corp., 742 F.2d 862, 877 (5th Cir. 1984); Schultz v. Newsweek, Inc., 668 F.2d 911, 918 (6th Cir. 1982); Bieghler v. Kleppe, 633 F.2d 531, 533 (9th Cir. 1980); Roberts v. Browning, 610 F.2d 528, 532 (8th Cir. 1979).

of Appeals' essay in creative jurisprudence requires correction not only because it violates the basic principles governing summary procedure which are followed by every other court as a matter of course, but also because it conflicts with the purpose that the "clear and convincing" barrier was erected to protect -- to screen out defamation claims by public figures which are inconsistent with the "uninhibited, robust, and wide-open" public debate guaranteed by the First Amendment. New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

II

WHERE, AS HERE, THE REPUTATIONS OF PUBLIC FIGURE LIBEL PLAINTIFFS ARE SO DEBASED THAT THEIR LEGAL INTEREST IN AVOIDING FURTHER INJURY IS MINIMAL BUT THE PUBLIC INTEREST IN ENSURING FREE DEBATE CONCERNING THEIR ACTIVITIES IS COMPELLING, FIRST AMENDMENT CONCERNS REQUIRE THAT SUMMARY JUDGMENT BE AWARDED TO DEFENDANTS

This case raises an important issue as to whether public figures such as Liberty Lobby can be heard to complain of injury to reputations which were demolished years ago through extensive publicity generated by as well as about themselves. In particular, petitioners ask this Court to consider whether the scrupulousness exhibited by the Court of Appeals to protect the reputations of Liberty Lobby and Carto did not entail the sacrifice of other, more compelling interests.

The record below is replete with examples of publicity generated by and about Liberty Lobby and Carto over a period of more than 20 years. The following excerpt from a 1980 article published by the Anti-Defamation League about Liberty Lobby's magazine The Spotlight is typical of the publicity the organization receives:

> The Spotlight, Liberty Lobby's principal newspaper, disseminates an array of racist, anti-Semitic propaganda reflecting the prejudices of its publisher, Liberty Lobby, a Washington-based far-right extremist organization. It is this effort to camouflage the true bigotry of its pages and to deceive its readers that make The Spotlight more insidious than other publications of its kind -- and distinguishes it from the crudes, more blatant hate sheets of the neo-Nazi organizations and Ku Klux Klan groups plaguing the American scene. Liberty Lobby, headed by Willis A. Carto, a long-time anti-Semite and its founder and treasurer. . . .

(App. D at 135-a 136-a.) See also, e.g., remarks of Representative Eilberg in the Congressional Record describing Liberty Lobby's message as a "vicious and clandestine brand of anti-Semitism" (App. D at 121-a); National Review's report of Carto's "preoccupation" with "'racial mongrelization'" (App. D at 149-a); and Los Angeles Times report that "'Carto wants a nationalist socialist dictatorship' in the United States" (App. D at 128-a, 129-a).

Even more telling of the public view of Liberty Lobby and Carto than the publicity they receive is that which they generate by their own writings, of which the following is an example:

> "Hitler's defeat was the defeat of Europe. And of America. How could we have been so blind? The blame, it seems, must be laid at the door of the international Jews. It was their propaganda, lies and denials which blinded the West. . . . If Satan himself

> had tried to create a permanent disintegration and force in the destruction of nations, he could have done no better than to invent the Jews."

App. D at 228-a, 229-a.

The record in the District Court on the subject of Liberty Lobby and Carto's reputation was clear as it is here: they are widely reputed to be anti-Semites, racists and admirers of Hitler. Since their reputations are so debased to begin with, the miscellany of statements[4] as to which the Court of Appeals

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[4] The allegations which the Court of Appeals remanded for trial were:

-- Allegation that Carto's "Joint Council for Repatriation" advocated forced deportation of blacks from the U.S. rather than (as plaintiffs concede) their "voluntary repatriation" to Africa. App. B at 69-a, 70-a; App. D. at 147-a to 154-a.

-- Allegation that Liberty Lobby occupies a building owned by a foundation whose Chairman is Carto, who bought the building with money contributed by Liberty Lobby, and that Liberty Lobby pays the foundation $6,000 per month

(footnote continued)

required a trial here could not as a matter of law have caused them harm. Just as summary dismissal is required when the court concludes that a chal-

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(footnote continued from previous page)
rent. App. B at 67-a; App. D at 144-a, 145-a.

-- Illustration suggesting that Carto emulated Hitler. App. B at 71-a; App. D at 157-a, 158-a.

-- Allegation suggesting Carto joined in singing the "Horst Wessel Lied" and made a speech emulating Hitler. App. 3 at 71-a, 72-a; App. D at 211-a, 212-a, 213-a.

-- Statement that Carto "conducts his business by way of conference calls from a public telephone." App. B at 72-a; App. D at 146-a.

-- Claim that in 1968 a Carto organization "used a direct mail blitz to support G. Gordon Liddy's congressional campaign in New York." App. B at 72-a; App. D at 146-a, 147-a.

-- Illustration showing Carto secretly observing prospective employees through a one-way mirror. App. B at 73-a; App. D at 155-a.

-- One-way mirror allegation, in text. App. B at 73-a; App. D at 188-a.

(footnote continued)

lenged statement could not be defamatory as a matter of law, so too is summary judgment appropriate where, as here, the allegedly defamatory statement could not as a matter of law be found to have caused damage.

The Court of Appeals' perception that the nine statements it remanded for trial could actually have caused injury to Liberty Lobby and Carto was, we submit, clear error. There is no conceivable damage to the reputation of a notorious racist from his being accused of advocating the forced deportation of blacks to Africa instead of "voluntary repatriation" (which, incidentally, he does advocate). The Court of Appeals was scrupulous to draw the moral dis-

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(footnote continued from previous page)
-- Claim that a lead story in The Spotlight was a hoax. App. B at 73-a; App. D at 209-a, 210-a.

tinction between these two views, App. B at 69-a, 70-a, but the existence of a moral distinction is not the issue: damage to reputation is the issue, and there could have been no such damage from the assortment of nine statements challenged here when their impact is measured against the universe of unchallenged public comment by and about plaintiffs and their activities.

In Simmons Ford, Inc. v. Consumers Union, 516 F. Supp. 742, 750-51 (S.D.N.Y. 1981), Judge Weinfeld, observing that plaintiffs "could not expect to gain more than nominal damages based on the addition to the article of the [challenged] misstatement," granted summary judgment for the defendant because he found that "plaintiffs' reputational interest in avoiding further adverse comment [was] minimal when com-

pared with the First Amendment issues at stake." Other courts have also denied recovery when the plaintiff's reputation has been irreparably stained by events prior to the challenged publication. Cardillo v. Doubleday & Co., 518 F.2d 638, 639 (2d Cir. 1975); Logan v. District of Columbia, 447 F. Supp. 1328, 1332 (D.D.C. 1978); Ray v. Time, Inc., 452 F. Supp. 618, 622 (W.D. Tenn. 1976), aff'd, 582 F.2d 1280 (6th Cir. 1978); Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 928 (C.D. Cal. 1982).

So too here, in view of the nature of respondents' activities and views as regularly expressed (see App. D at 120-a, et seq.), it must be seen that the reputational interest at stake as a result of the allegedly defamatory statements over which the Court of Appeals denied sumary judgment is de mini-

mis in comparison with the constitutional interest in ensuring free and open public scrutiny of the views and activities of Liberty Lobby and Carto. That open scrutiny should not be inhibited by lawsuits, such as this, which can have no result other than to expose defendants to the burden and expense of defending them.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

April 9, 1985

Respectfully submitted,

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